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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-6621

GARY MELVIN GILMORE,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

DONALD DAY BROWN,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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Petitioners, Gary Melvin Gilmore and Donald Day Brown, respectively pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered May 29, 1975, rehearing and request for hearing in banc denied October 3, 1975.

OPINION BELOW

The Court of Appeals entered its unpublished memorandum decision, No. 74-3380, on May 29, 1975. A copy of the opinion is attached as Appendix A. Petition for Rehearing and Request for Hearing in Banc were denied on October 3, 1975. A copy of the order denying the petition for rehearing and request for hearing in banc is attached as Appendix B.

JURISDICTION

On May 29, 1975, the United States Court of Appeals affirmed the conviction of petitioners for conspiring to possess marijuana with intent to distribute and for possessing marijuana with intent to distribute (Appendix A). Rehearing and request for hearing in banc were denied on October 3, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the corroboration of innocent details provided by an untested informant constitutes probable cause for a warrantless arrest?

II. Whether an emergency created entirely by officers' actions may constitute an exigent circumstance sufficient to excuse the necessity of obtaining an arrest warrant, otherwise required by the Fourth Amendment under the circumstances?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Around March 20, 1974, DEA Agent Dersham received information from Connecticut State Police that a John Mitchell had boarded a plane to San Diego from Connecticut. An inspection of the luggage he checked at the Connecticut Airport revealed that it contained blocks of wood and marijuana debris. This information was passed to San Diego narcotics officers and a surveillance was initiated upon Mitchell's arrival in San Diego. Upon his arrival Mitchell took a cab to 4411 Saratoga, San Diego (Reporter's Transcript, hereinafter referred to as "R.T." 5).

A check of San Diego Gas & Electric Company indicated the residence belonged to appellant Gilmore. A spot surveillance of the Saratoga address was conducted between March 20 and April 6th. On April 6th information was received that Mitchell had taken a cab from the residence with more suitcases than when he arrived. The record is silent as to where Mitchell went in the cab. The information regarding Mitchell leaving the Saratoga residence with a numer of suitcases was forwarded to Connecticut State Police who at some point arrested Mitchell with 160 pounds of marijuana in Connecticut. (R.T. 6).

On April 30th Agent Dersham and Agent Flores of San Diego Police Department Narcotic Division talked to Mitchell upon his return to San Diego regarding the marijuana dealings of appellant Gilmore. (R.T. 6,7). The agents instructed Mitchell to contact Gilmore for the purpose of

ordering marijuana for him. (R.T. 26-7).

The agents received general information regarding Gilmore from the Department of Motor Vehicles, the San Diego Police Department information record division and conversations with narcotics agents and neighbors beginning on March 20, 1974. Prior to that date they had no information on any illegal activities by appellant Gilmore. (R.T. 117-19). Appellant Gilmore's neighbors supplied information from March 20 onward regarding license plates and cars which had been to appellant's house. The information the agents received from other case reports or agencies was used solely as a basis for the amount of manpower to be used on the investigation. (R.T. 76-79). However, none of the information from neighbors or other agencies related to illegal activity. (R.T. 119-21,80-89).

The day after Mitchell's arrival, April 30, he was taken by agents to an area a few blocks away from 4411 Saratoga where he was let out of the car and went on foot to the residence. The day after that Mitchell called Agent Dersham and informed him of his contact with appellant Gilmore and Gilmore's prior marijuana deliveries. (R.T. 7-8). The record is silent as to whether or not Mitchell was surveilled and in fact went to the appellant's home during this period of time.

On May 2nd Mitchell informed Dersham that Gilmore was trying to arrange a load for him within a couple of days. (R.T. 8).

On May 4, 1974, Mitchell telephoned Dersham to tell him that Dave McDonald and Donald Brown had brought a load of marijuana to the residence and unloaded it in Gilmore's garage the night before. Further, that Donald Brown had said that another load was coming soon and as soon as he received the phone call at his own house it would be there. (R.T. 11-12). The narcotics

agents learned the name Donald Brown through a Department of Motor Vehicles check of a yellow Volkswagen which was registered to him. Mitchell did not give the agents Brown's name although he did supply them with a physical description on May 4. (R.T. 68-69).

At noon on May 5, 1974, Agent Dersham received a phone call from Mitchell stating that Brown had arrived at Gilmore's residence and stated that a load, about 230 kilos, were in the area in a camper and the driver would be bringing them over any minute. Dersham contacted other agents and proceeded to 4411 Saratoga where he observed an older model black Ford pickup with a white camper parked adjacent to the garage. (R.T. 13-14).

After Agent Flores arrived that afternoon, he spoke with Mitchell at the side of the residence. Mitchell told him the load had been delivered in the black pickup and was now in large boxes in the garage. Further, Mitchell said he had secured three kilos of marijuana from the load and was going to use it as a sample and had told Gilmore he was going to contact his friends concerning the load's arrival. (R.T. 103-04). Mitchell showed Flores the bag containing a sample but Flores did not see the sample itself. (R.T. 167-69). Flores instructed Mitchell to make sure the load was still in the general vicinity and to try to give them some sign by which they would know everything was all right so that the agents could enter the residence. Flores advised the other units they were to enter the residence and instructed some of them to go to the rear and guard against escape. (R.T. 105-06). Flores had not examined the vehicle and did not see any marijuana or debris in it at any time. (R.T. 161).

While Flores was speaking to Mitchell the camper left and Dersham instructed other agents

to follow it and return to the residence as quickly as possible. (R.T. 16). Sgt. Corey and others followed the camper truck, stopped it, arrested the driver, secured the vehicle, did not search the vehicle, did not ask the driver his name, and returned the driver back to the residence. (R.T. 172-74, 186, 203-05).

When the agents returned, Dersham advised that there were over 230 kilos in the garage and two suspects and an informant in the residence and that they were to secure the residence because there was a possibility the informant was in danger of being discovered and they believed that the marijuana which was packaged in large boxes could easily be moved out of the garage away from the residence quickly therefore forever losing the contraband. (R.T. 18-19). Dersham and approximately eight other officers proceeded to secure the residence and approach the front door. (R.T. 19). Sergeants Corey and Bailey positioned themselves in the back yard between the garage and the house. A noise was heard at the door of the garage and Bailey said something to the effect of "don't come out" or "stay inside". Corey then heard the large door of the garage being opened and then a banging sound. Since there was a vehicle parked in front of the large garage door, Corey felt that the door had hit the vehicle. (R.T. 174). Corey ran to the back door of the garage where he knocked on the door and asked the people inside to open up. He observed two individuals in the garage try the side door and saw movement. (R.T. 175-77). Corey directed the person who opened the side door to get against the wall and identified himself as a police officer as he went into the garage. He did not obtain consent from any individual to enter the garage and it was stipulated he had no warrant. (R.T. 189-92). Upon entering the garage he observed marijuana kilos on a bench and some large carboard boxes. (R.T. 192).

Agent Dersham checked the home for the suspects and entered the garage. Approximately 230 kilos of marijuana were found there in four large carboard boxes along with several loose kilos on a workbench or mattress. (R.T. 20-23). Flores also entered and advised Gilmore that besides being under arrest for possession for sale of marijuana that he had an order to search his person and residence and showed a probation order to him. The residence and garage was then searched pursuant to the probation order. (R.T. 110-12). Flores observed appellant Brown but did not find any contraband in his physical possession or on him. He found no contraband on Brown's vehicle and does not know when Brown arrived at the residence. (R.T. 147-49).

The next day a further search of the garage revealed approximately nine kilos of marijuana under a work bench. (R.T. 24-5).

On May 15, 1974, the November 1973 Grand Jury for the Southern District of California returned a two count indictment against petitioners. The indictment alleged that petitioners knowingly and intentionally combined and conspired with each other to possess with intent to distribute 230 kilos of marijuana in violation of Title 21 U.S.C. §841(a)(1), a Schedule I controlled substance.

The second count of the indictment charged both appellants with intent to distribute 510 pounds of marijuana, a Schedule I controlled substance, in violation of Title 21 U.S.C. §841 (a)(1). (Clerk's Record on Appeal, hereinafter referred to as "C.R." 1-3). The acts were allged to have occurred up to and including May 5, 1974, in the Southern District of California.

On June 24, 1974, defendant McDonald (not petitioner herein) filed motions to suppress

evidence and reveal identity of informant. (C.R. 15-29). Trial counsel for petitioner Gilmore and petitioner Brown joined in this motion. (C.R. 30-3). Additionally, trial counsel for petitioner Gilmore filed a motion to suppress evidence that was obtained through the use of a probation order on petitioner Gilmore. (C.R. 34-43).

On July 5, 1974, the government filed various motions in opposition to the motions previously filed by petitioners. (C.R. 44-58).

Sworn testimony on the motions to produce the informant and to suppress evidence was held on July 8, July 26 and August 16, 1974, (see Reporter's Transcript). On August 16, 1974, after argument by counsel, the court denied the motion to suppress the evidence seized in the garage of petitioner Gilmore in that the search was based upon probable cause. (R.T. 222-24). A motion to suppress evidence found as a result of a later search pursuant to a probation order of petitioner Gilmore was denied on the basis of the probation order itself. (R.T. 226-27).

On September 20, 1974, petitioners Gilmore and Brown executed "Waiver of Trial by Jury and Waiver of Special Findings of Fact". (C.R. 66-7). On September 25, 1974, a written Stipulation was submitted on behalf of both petitioners and the government. (C.R. 69-78). The various parties agreed to proceed by way of stipulation in lieu of trial so that the court could make a finding of guilt or innocence upon the written stipulation. (R.T. 232-34). An additional stipulation was entered into between the government and petitioner Brown that a vehicle registered to Brown appeared at the Gilmore residence on March 24, 1974, and on the day of arrest. (R.T. 233). The court found both petitioners guilty. (R.T. 236).

On November 25, 1974, the court sentenced

petitioner Gilmore to the custody of the Attorney General or his authorized representative for a term of three years pursuant to 18 U.S.C. §4208(a)(2) on each count, both counts to run concurrent with each other. Additionally, a five year term of special parole was prescribed under 21 U.S.C. §841(b)(1)(B). Petitioner Gilmore filed notice of appeal on November 26th and was allowed to remain on the original bond which was previously set. (C.R. 80-3).

On December 16, 1974, petitioner Brown was committed to the custody of the Attorney General or his authorized representative for a term of 15 months pursuant to 18 U.S.C. §4208(a)(2) and ordered to serve a special parole term of three years pursuant to 21 U.S.C. §841(b)(1)(B). A notice of appeal was filed on December 16, 1974, and petitioner was allowed to remain on original bail posted pending appeal. (C.R. 84-87).

On May 29, 1975, the United States Court of Appeals for the Ninth Circuit rendered its decision affirming the petitioners' convictions (Appendix A) although agreeing that evidence obtained through use of the probation order should have been suppressed. A Petition for Rehearing and Request for Hearing in Banc was denied on October 3, 1975. (Appendix B).

REASONS FOR GRANTING THE WRIT

I

The affirmation of a warrantless arrest, the probable cause for which is the corroboration of innocent details provided by an untested informant, is offensive to the warrant requirements of the Fourth Amendment and previous decisions of the Supreme Court.

It is fundamental that an arrest with or without a warrant must stand upon a more substantial basis than mere suspicion, Henry v. United States, 361 U.S. 98 (1959), though, at the same time, neither must the arresting officer have sufficient evidence in hand to convict. Rather, the officer must have the amount of information which constitutes probable cause to arrest, evidence would would "warrant a man of reasonable caution in the belief" that the defendant had committed or was committing an offense, Carroll v. United States, 267 U.S. 132 (1925), and the existence of probable cause must be measured by the facts of the particular case. Beck v. Ohio, 379 U.S. 89 (1964).

The history of the use and abuse of the power to arrest suggests that a relaxation of the fundamental requirements of probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice." Brinegar v. United States, 338 U.S. 160, 176 (1949). Thus, it is that before an arrest warrant will issue, an officer must make a showing of probable cause before an impartial magistrate - and when no warrant is sought, the standards applicable for assessing the officer's probable cause assertion at the time of the challenged arrest and search are at least as stringent as those applied by the magistrate,

Whitely v. Warden, 401 U.S. 560 (1970), lest the incentive for obtaining warrants be destroyed.

Draper v. United States, 358 U.S. 307 (1959) established that, in a warrantless arrest situation, probable cause may be established based upon an informant's tip if there is subsequent corroboration of the details of the tip to insure reliability. Although in Draper the informant had previously given accurate and reliable information, he did not state the means by which he obtained his information. Instead the informant described in great detail the surrounding facts and circumstances of the reported crime, and upon on-the-scene corroboration by the officers, the Court held probable cause had been established.

In Wong Sun v. United States, 371 U.S. 471 (1962), the known reliability, or lack thereof, of the informant was shown to be a factor in evaluating whether probable cause may be derived from an informant's tip. Later, in Aguilar v. Texas, 378 U.S. 108, 114 (1964), it was stated that a tip, alone, could support a finding of probable cause if both the underlying circumstances supporting the credibility of the informant and the underlying circumstances from which the informant reached the conclusions conveyed in the tip, could be shown by the government.

Spinelli v. United States, 393 U.S. 410 (1969), approved Draper and Aguilar, and summarized the procedure to be used in evaluating an informer's tip as the basis for probable cause:

> The informer's report must first be measured against Aguilar's standards so that its probative value can be assessed. If the tip is found inadequate under Aguilar, the other allegations which corroborate the information

> contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?

393 U.S. at 415.

Thus, it may be seen that the central focus in evaluating the reliability of an informant and the informant's tip, absent underlying circumstances related directly thereto, is to evaluate, given all the facts and circumstances involved, whether the tip is substantially trustworthy. Viewed in that light, the Draper court found the corroborated detail of the tip of sufficient depth to be inherently reliable, while in Spinelli it was found that too much of the information was innocuous, not in and of itself trustworthy evidence that a crime has been committed.

That the Ninth Circuit has been scrupulous in applying the tests set forth by the Supreme Court for such cases is clear from a survey of its decisions - until this case. The United States, in its appellate brief, offered many examples of the care taken by the Ninth Circuit to assure reliability and corroboration. Among the factors cited in finding probable cause despite failure to fulfill the Aguilar requirements are declarations against penal interest, (Louie v. United States, 426 F.2d 1398 [9th Cir. 1970]), statements made without expectation of personal benefit due to mortal injury (Gilbert v. United States, 366 F.2d

923 [9th Cir. 1966]), corroboration of very detailed information (United States v. Smith, 503 F.2d 1037 [9th Cir. 1974]) and corroboration based upon personal observation of the actions of the accused by the officers (United States v. Avila, 469 F.2d 276 [9th Cir. 1972]).

The demand for trustworthy evidence of crime as a prerequisite when Aguilar is not met may also be seen in the instances in which the finding of probable cause has been overturned. Clearly, the government must have more than "a statement supported by nothing that was not open and obvious to anyone." United States v. Hamilton, 490 F.2d 548 (9th Cir. 1974). Importantly, the major examples of such open and obvious detail has come in cases where the government have corroborated only information of car license numbers and car movement, and the courts have found such corroboration not sufficiently trustworthy as evidence of crime, as too innocuous. See, e.g., United States v. Larkin, 510 F.2d 13 (9th Cir. 1974); United States v. Hamilton, supra.

Furthermore, it has been widely recognized that for one notably unreliable class of informants, narcotics informants, even more detailed than usual corroboration must be presented to assure trustworthiness:

> Weaver was unlike the usual informer, most of whom are encountered in narcotics. They are usually witnessing to secret transactions to which only they and the accused were privy. They are often informing for hire. Commonly addicted themselves, they are often motivated by hope or promise of personal immunity from prosecution or leniency in

> punishment. In consequence they are "frequently 'monstrous liars.'"

Gilbert v. United States, supra, at 931 n.9, distinguishing the informant there at hand. This view has been often repeated and relied upon. See, e.g., Louie v. United States, supra at 1401; Pulido v. United States, 425 F.2d 1391 (9th Cir. 1970), Castillon v. United States, 298 F.2d 256 (9th Cir. 1962).

That the court in the instant case erred by misapplying its own standards, and, at the same time, contradicted the major safeguards presented and developed in the decisions of the Supreme Court may be seen by an analysis of the facts.

Being an untested informant, Mitchell's testimony, without corroboration or without other adequate indicia of reliability, could not have provided sufficient probable cause to arrest the petitioners under the guidelines set out in Draper v. United States, supra, and Spinelli v. United States, supra. Therefore, both corroboration, which was relied upon by the Court of Appeals, and other factors to be considered in evaluating reliability must be considered.

The officers never had any personal contact with the defendants and did all of their alleged negotiating through the previously untested informant. It is uncertain whether, prior to May 5, 1974, the police even observed Mitchell go into petitioner Gilmore's residence. Although a utilities check indicated that Mr. Gilmore rented the Saratoga residence, there is no indication in the record that he was at that address during any of the times the informant alleged he had met with him.

The basic corroboration by the officers appears to be that they kept the Gilmore residence under surveillance. They discovered through

reports of neighbors that cars frequently were seen in the area of the residence, but the number and rate of frequency are not particularized.

Several vehicles, alleged by the informant to be carrying contraband, were spotted (one before the information was received, one after), but no exchange of contraband was ever corroborated. On the day of the arrest, while the residence was under surveillance, the officers did not see the camper alleged to be making a delivery of marijuana arrive and unload, although they subsequently observed a camper leaving the residence.

The sack in which the informant claimed to have a sample of the marijuana was never investigated, so even at this stage the presence of contraband had not been corroborated. Thus, in sum, corroboration existed only of vehicular movement, that which has been often before rejected as a basis for probable cause on the grounds that it is evidence which is too innocuous, which is open and obvious to anyone. United States v. Larkin, supra; United States v. Hamilton, supra.

Furthermore, the inadequacy and innocence of the corroborated evidence is heightened by the absence of any indicia of reliability in the informant or his information. Beyond the facts that the informant was untested and that he was a member of a notoriously unreliable class of informants, narcotics informants seeking leniency from the government, it is clear that any other evidence of reliability and trustworthiness, such as those relied upon in United States v. Harris, 403 U.S. 573 (1971), was also missing. The informant here was making no declaration against penal interest in that he was supplying no information about any crime in which he faced criminal jeopardy. Rather, he was acting

entirely for the government, having already confessed participation in a crime entirely unrelated to the matters at hand.

Moreover, in direct contrast to the statement of the appellate court (Memorandum Decision at page 2 n. 1), the informant had every expectation of personal benefit should he provide any information, whether true or believeable but false, since his sole reason for contacting Gilmore was to secure lenient treatment from the government. The informant's status, unable to incriminate himself but able to benefit, certainly adds no weight to his reliability or to the innocent information corroborated by the officers.

That the appellate court's decision is at great variance not only with the prior holdings of the Ninth Circuit but also with the decisions of the Supreme Court may best be seen by contrasting the instant case with that upon which the appellate court placed greatest reliance, Musgrove v. Eyman, 435 F.2d 1235 (9th Cir. 1971). The informant in Musgrove provided information against his penal interest about a crime in which he participated, very detailed information which corresponded with that already known to the officers about the crime in question, and it was upon these two factors, neither of which may be found in the instant case, that the finding of probable cause was upheld. Moreover, the Musgrove court placed major emphasis upon the fact that the informant was not a narcotics offender, a category dismissed as "notoriously unreliable source(s)" (Id. at 1238); of course, the case here presented does involve a narcotics offender. Clearly Musgrove, which fully adheres to the guidelines set by the Supreme Court, offers little support for the decision reached by the appellate court here.

The situation seems, instead, to be within the finding of the court in Spinelli v. United States, supra at 418:

> ...we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed. As we have already seen, the allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves - and they are not endowed with an aura of suspicion by virtue of the informer's tip.

The decision of the Court of Appeals here is not only at variance with other rulings within the circuit, but - in its finding probable cause from the corroboration of innocent details provided by an untested unreliable informant, which information and details were never subject to the scrutiny of a disinterested judicial officer - it also is without support in the guidelines established by the Supreme Court, is in fact well outside those guidelines, and represents a major dilution of the important safeguards and guarantees of trustworthiness that the court has constructed to assure fulfillment of the Fourth Amendment protections.

II

> Deciding that an arrest warrant is mandated before entry into a man's house to arrest him is consistent with the basic principles of the Fourth Amendment, but affirmation of a finding that an emergency created entirely by officers' actions may constitute an exigent circumstance sufficient to excuse that mandate would

> seriously undermine the entire notion of the Fourth Amendment requirement.

Although the Supreme Court has never specifically ruled on the question of whether an arrest is mandated before entry into a man's house to arrest him, freedom from intrustion into the house or dwelling has long been considered fundamental to the privacy protections of the Fourth Amendment. See, e.g., Agnello v. United States, 269 U.S. 20 (1925). For example, a warrantless search of a house is per se unreasonable under the Fourth Amendment. Coolidge v. New Hampshire, 403 U.S. 443, 444-445 (1971).

The requirement of a warrant rests primarily on the conception that it is for a judicial officer, and not the prosecution or police, to determine whether the security of the community requires that the right of privacy of one's household must yield to a right of entry, search and seizure. As stated in Johnson v. United States, 333 U.S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime... The right of officers to thrust themselves into a home is...a grave concern, not only to the individual but to a

> society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

The general need for and importance of a warrant in Fourth Amendment issues may be seen by the continuing attention given such matters by the Supreme Court. See, e.g., Chimel v. California, 395 U.S. 752 (1969); Coolidge v. New Hampshire, supra. And, in considering whether to impose a general requirement of a warrant as a condition for entry into a house for the purpose of making an arrest, the District of Columbia Circuit, in Dorman v. United States, 140 U.S. App.D.C. 313, 435 F.2d 385, 390 (1970), reflected these concerns, stating:

> ...the basic principle, the constitutional safeguard that, with room for exceptions, assures citizens the privacy and security of their homes unless a judicial officer determines that it must be overridden, is applicable not only in case of entry to search for property, but also in case of entry in order to arrest a suspect.

The requirement of an arrest warrant before entry into a house to make an arrest has been adopted by several other circuits. See, e.g., United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974); United States v. Davis, 461 F.2d 1026 (3rd Cir. 1972).

The Supreme Court has never directly ruled on the existence or scope of such an arrest warrant requirement, leaving the matter in a somewhat uncertain state. See, United States v. Baginet, 462 F.2d 982, 987 (8th Cir. 1972). However, as stated in Coolidge v. New Hampshire, supra at 480, Warden v. Hayden, 387 U.S. 294 (1967), where the court emphasized a "hot pursuit" justification for the police entry into defendant's house without a warrant for his arrest, clearly stands by negative implication for the concept that an arrest warrant is required in the absence of exigent circumstances.

In Coolidge a persuasive argument was advanced in favor of an arrest warrant requirement before entry into a suspect's house. After noting the traditional distinction made between searches and seizures that take place on a man's property and those carried out elsewhere, the Court stated, 403 U.S. at 477-478:

> It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well defined "exigent circumstances."

The court reasoned, without deciding in favor of the converse, that if this "fundamental conflict" were resolved by declaring per se reasonableness of both warrantless arrests and searches, given probable cause, "we would simply have read the Fourth Amendment out of the Constitution. Id.

at 480.

The clear implication of Coolidge, Warden, the rules adapted by the several circuits, and the basic principles underlying the Fourth Amendment is that, absent exigent circumstances, an arrest warrant must be required before entry into a man's home for the purpose of arresting him. Assuming, pro arguendo, that probable cause to arrest may be found, the arrest warrant requirement certainly should have applied in the instant case in light of the officers' warrantless entry into petitioner Gilmore's home, warrantless despite the fact that they believed for several days prior to the entry that illegal activity was being conducted therein. The validity of the warrant requirement here was impliedly recognized by the Court of Appeals' ciscussion of exigent circumstances (Memorandum Decision at page 2), and such recognition was proper.

Thus, the question of whether exigent circumstances, sufficient to excuse the arrest warrant requirement were in existence must be considered. It seems apparent that should an arrest warrant requirements be recognized, exceptions to the requirement in cases of exigent circumstances would similarly be recognized; in fact, circuits which have adopted an arrest warrant requirement have so ruled. See, e.g., Dorman v. United States, supra at 391. While the scope of the exigent circumstances available to excuse an arrest warrant may vary from warrantless search situations, the same general guidelines should apply due to the similarity of purpose and underlying principles.

Absent a warrant, there are only a few well established and defined situations where a warrantless search will be excused. Vale v. Louisiana, 399 U.S. 30, 34 (1970). The exceptions to the warrant requirements are

jealously and carfully drawn and there must be a showing by those seeking the exemption that the exigencies of the situation made that course imperative. Coolidge v. New Hampshire, supra at 455.

Vale v. Louisiana, supra at 34-35, discusses the various circumstances considered to be exigent, including consent searches, response to an emergency, hot pursuit of a fleeing felon, goods in the process of destruction or goods about to be removed from the jurisdiction.

Although raised by the government, below, the Court of Appeals rightly did not rely upon either of the latter two grounds. The cases cited in Vale well demonstrate that unless the government can show a real, as opposed to an assumed, possibility of immediate destruction or removal under these rationales, the failure to obtain a warrant will not be upheld. United States v. Jeffers, 342 U.S. 48 (1951); Chapman v. United States, 365 U.S. 610 (1961); Johnson v. United States, 333 U.S. 10 (1948). The fact of prior surveillance and opportunity to obtain a warrant before the alleged "exigency" has often been stated to render the absence of a warrant inexcusable, despite "new" developments immediately preceding the entry. McDonald v. United States, 335 U.S. 451 (1948); Ker v. California, 374 U.S. 23, 42 (1963). As stated in Johnson v. United States, supra at 15, citing Taylor v. United States, 285 U.S. 1 (1932):

> No reason is given for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare the papers and present evidence to a magistrate. These are never very convincing reasons and, in these circumstances,

> certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a moveable vehicle. No evidence or contraband was threatened with removal or destruction, except for the fumes which we suppose in time would disappear.

The agents in the instant case likewise had no valid reason for failure to obtain a warrant, especially if possible destruction or removal of the contraband is offered as an excuse therefor. The agents had five or six days, prior to the alleged "sudden" arrival of the last marijuana shipment, in which their informant had told them of illegal transactions occuring in, and illegal contraband resting in, petitioner Gilmore's home, during which time they surely could have tested their information for probable cause before a disinterested magistrate. Furthermore, there was never any suggestion that the petitioners suspected Mitchell of duplicity at the time of the entry - rather, it is entirely reasonable to believe that the purported sellers of contraband were prepared to wait for the expected buyers, and to not move the marijuana from the house.

Clearly, the officers had more than sufficient time to request a warrant and this, especially when considered with the unlikely prospect of destruction or removal of the contraband, makes failure to obtain a warrant inexcusable on these grounds. These factors clearly distinguish the instant case from United States v. Bustamante-Gamez, 488 F.2d 4 (9th Cir. 1973), the only case cited by the Court of Appeals as an applicable example of exigent circumstances, which was expressly stated to not

be a situation in which probable cause was obtained through normal investigative procedures, where a warrant must be obtained. Id. at 8. In the instant case, if probable cause was found at all, it was through such procedures, time was not of the essence - at least with regard to the contraband - and the warrant requirement could not be excused.

These same factors also distinguish this case from the many cases in which the lower courts have almost automatically found exigent circumstances in narcotics violations. See United States v. Davis, 461 F.2d 1026, 1031-1032 (3rd Cir. 1972). Such cases, rather than narrowly drawing exceptions to the warrant requirements, as mandated by Coolidge, seem to replace the exception for the rule, are contrary to Supreme Court guidelines and the protection guaranteed by the Fourth Amendment, and should not be controlling here.

Similarly, the exception to the warrant requirement which was relied upon by the Court of Appeals here, that the requirement of a warrant is excused in the case of an emergency, should not be applicable here. Furthermore, to approve the application of the exception as developed here would dangerously undermine much of the protection provided by the Fourth Amendment.

The emergency exception contemplated in Vale v. Louisiana, supra, is that described in McDonald v. United States, supra at 454, "a case where the officers, passing by on the street, hear a shot and a cry for help and demand entrance in the name of the law." Just as the Court in McDonald rejected the claim of emergency due to the fact that the officers had more than adequate time prior to the so-called emergency to obtain a warrant, so it should be rejected here.

But a further, and more important, reason exists for rejecting the emergency exception in this

case. The alleged emergency, that "[I]f the agents had moved in quickly, the informant would have been endangered" (Memorandum Decision at page 2), was created entirely by the actions of the officers. Had the officers suggested any other plan to the informant, such as telling the parties in the house that he was going to meet his "business partners" and would return with the money in several hours, the emergency would have been avoided - and the agents would have had sufficient time to obtain a warrant. Instead, the one plan which would endanger the informant and create an "emergency" was selected: to tell the parties in the house that they could expect delivery of the money immediately. In that manner the informant became "endangered" should there be any delay, and the warrantless entry was sustained. The approval of such actions as exceptions to the Fourth Amendment amounts very nearly to the sanctioning of warrantless searches and arrests.

The lower courts have rejected claims of exigent circumstances which are the direct result of officers' actions. In United States v. Bustamante - Gamez, supra at 8 n.4 it was stated: "We have no doubt that the officers were making a good faith attempt to locate the car; they were not creating exigent circumstances. A different case would be presented if there were the possibility of abuse." Similarly, in cases in which the exigent circumstance, the possibility of destruction of evidence, is due entirely to the presence of officers who would otherwise have required a warrant, it has been held that "[I]f exigency arises because of unreasonable and deliberate delay by officers, it is not an exigent circumstance capable of dispensing with the requirement of a warrant." United States v. Curran, 498 F.2d 30, 34 (9th Cir. 1974). Accord, Shuey v. Superior Court, 30 Cal.App.3d 535 (1973); United States v. Scheffer, 463 F.2d 567 (5th Cir. 1972), cert. den., 409 U.S. 984 (1973). Such was the case here.

In considering the almost automatic exceptions to the warrant requirements in narcotics cases, and similar exceptions in officer created exigencies, the statement of the Court in Coolidge v. New Hampshire, supra at 481 should be noted:

> [The warrant requirement] is not an inconvenience to be somehow "weighed" against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well - intended but mistakenly over-zealous executive officers" who are a part of any system of law enforcement. If it is to be a true guide to constitutional police action rather than just a pious phrase, then "the exceptions cannot be enthroned into the rule."

Should the Court decide that an arrest warrant is mandated before entry into a man's house to arrest him is consistent with the basic principles of the Fourth Amendment, but then affirm or let stand a finding that an emergency created entirely by officers' actions may constitute an exigent circumstance sufficient to excuse that mandate would be to seriously undermine prior Supreme Court decisions as well as the entire notion of the Fourth Amendment warrant requirement.

CONCLUSION

For the foregoing reasons, the petitioners, Gary Melvin Gilmore and Donald Day Brown, respectively pray that a writ of certiorari issue to review the decision below.

DATED: October 31, 1975

PHILIP A. DeMASSA,
Attorney for Gilmore

PATRICK J. BRIGGS,
Attorney for Brown

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. GARY MELVIN GILMORE, DONALD DAY BROWN, *Defendants-Appellants.*	No. 74-3380 75-1113 MEMORANDUM

[May 29, 1975]

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS, MOORE,* and HUFSTEDLER, Circuit Judges

Defendants appeal from their convictions for conspiring to possess marijuana with intent to distribute and for possessing marijuana with intent to distribute (21 U.S.C. §§ 841(a)(1), 846). The district court found defendants guilty on the basis of stipulated facts. Defendants' contentions concern the validity of the seizures of marijuana.

Defendants' first contention is that the agents lacked probable cause to arrest. We disagree. The probable cause to arrest was based on information supplied by the informant. While it is true that the informant had not been used by the Government before and hence was "untested," the agents independently verified several significant details of the informant's story; the details certainly were not "innocuous." (*E.g., Musgrove v. Eyman* (9th Cir.

*Honorable Leonard P. Moore, Senior Circuit Judge, 2d Circuit, sitting by designation.

1971) 435 F.2d 1235, 1238; *compare United States v. Larkin* (9th Cir. 1974) 510 F.2d 13 (verification of "innocuous" details not corroborative).[1] "Exigent circumstances" justified the agents' warrantless entry of the garage to arrest defendants. (*See United States v. Bustamante-Gamez* (9th Cir. 1973) 488 F.2d 4, 7-9.) The transaction commenced earlier than the agents had anticipated. If the agents had not moved in quickly, the informant would have been endangered. He had promised the defendants that his (nonexistent) "business partners," to whom he supposedly had just placed a phone call (in fact, he had phoned the agents) would arrive momentarily, and any delay could have placed him in serious jeopardy. The marijuana in the garage was in plain view of the agents when they entered to arrest defendants and therefore was subject to immediate seizure.

Defendants' second contention is that the search of Gilmore's house, pursuant to a condition of probation, was unlawful. We agree. The search was not effected by or even with the authorization of Gilmore's probation officer for a probation-related objective. (*See United States v. Consuelo-Gonzalez* (9th Cir. en banc 1975) ..... F.2d ..... [Slip Op'n No. 73-2122].) We are convinced, however, that the error was harmless because the bulk of the marijuana was seized in the garage prior to the search of the house. There was more than sufficient admissible evidence to sustain the convictions.

AFFIRMED.

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[1]The informant was cooperating with the Government in an effort to secure lenient treatment in a state (Connecticut) drug case, related to the matters herein. Thus, the informant had little interest in communicating false information to the agents.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY MELVIN GILMORE, DONALD DAY BROWN, Defendants-Appellants.	No. 74-3380 No. 75-1113 O R D E R

Before: CHAMBERS, MOORE,* and HUFSTEDLER, Circuit Judges

The petition for rehearing is denied.

The full Court has been advised of the suggestion for an en banc hearing. No judge in active service has voted to take the case en banc. The en banc suggestion is denied.

*Honorable Leonard P. Moore, U.S. Circuit Judge for the Second Circuit, sitting by designation.

Pet. Stay mandate

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-662

GARY MELVIN GILMORE AND
DONALD DAY BROWN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their warrantless arrests were not supported by probable cause and that marijuana seized during the arrests therefore should have been excluded from evidence at trial.

Following a jury-waived trial on stipulated facts in the United States District Court for the Southern District of California, petitioners were convicted of having conspired to possess and having possessed marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Gilmore was sentenced to concurrent terms of three years' imprisonment, with provision for parole under 18 U.S.C. 4208(a)(2), to be followed by a special parole term of five years. Petitioner Brown was sentenced to concurrent terms of fifteen months' imprisonment, with provision for parole under 18 U.S.C.

4208(a)(2), to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. A 1-2).

1. In late March of 1974, agents of the San Diego County Integrated Narcotics Task Force (NTF)[1] were advised by Connecticut police that marijuana debris was known to be in the luggage of John Mitchell, who was flying to San Diego. Upon Mitchell's arrival in San Diego, NTF agents followed him to petitioner Gilmore's house, where they undertook a surveillance. When Mitchell left Gilmore's house on April 6, 1974, the agents noted that he was carrying more suitcases than when he arrived. They relayed this information to Connecticut police, who arrested Mitchell that same day in Connecticut with approximately 160 pounds of marijuana in his possession (Tr. 5-6).

Mitchell agreed to cooperate with an NTF investigation of his marijuana suppliers on the condition that his cooperation be revealed to the Connecticut state prosecutor (Tr. 71-72). On April 30, 1974, Mitchell met with NTF agents in San Diego and advised them that Gilmore had supplied him with the marijuana that the Connecticut police had seized (Tr. 6, 97-98). The NTF agents instructed Mitchell to arrange to purchase additional marijuana from Gilmore (Tr. 7, 9-10, 97, 117-118). Accordingly, on May 1, 1974, Mitchell returned to Gilmore's house, where he would reside until May 5 (Tr. 98-101).

On May 2, 1974, Mitchell advised agents that he had placed an order with Gilmore for 230 kilograms of marijuana at a price of $30,000 (Tr. 7, 9-10, 99). Gilmore had assured Mitchell that he could supply the desired amount and boasted that only the preceding day he had "done a deal" for 500 kilos (Tr. 7).

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[1]The NTF consisted of narcotics agents from the Drug Enforcement Administration and local jurisdictions.

On the evening of May 3, 1974, Mitchell told the agents to expect a marijuana delivery at Gilmore's residence either that evening or the following morning. Accordingly, a surveillance of Gilmore's residence was established and, at approximately 9:45 p.m., Gilmore was seen entering the detached garage, turning on a light, and covering the window (Tr. 10-11, 157-159, 194-195, 198).

An automobile drove up, and the garage light went out. The garage door opened, a figure motioned the car to enter, the car drove in, the garage door closed, and a light inside was turned on. An agent who approached the garage heard voices inside. He also heard the opening of a car trunk, the apparent unloading of objects, and finally the closing of the trunk. The garage light again was turned off, the garage door opened, and the same car drove out. The car drove about 200 feet down an alley with its headlights off; the lights then were turned on, and the car sped away (Tr. 158-159).

The morning following the agents' observations of these events, May 4, 1974, Mitchell telephoned an NTF agent and reported the delivery of 95 kilograms of marijuana to Gilmore's residence the night before. Mitchell said that he had been present in the garage and had seen petitioner Brown unload the marijuana (Tr. 12). Mitchell also told the agents that on the morning of May 4, petitioner Brown had again been at Gilmore's residence and had told Mitchell that his marijuana was coming soon. Brown also had indicated to Mitchell that he was returning home to await a telephone call that would advise him that Mitchell's marijuana was ready for delivery (Tr. 11).

About 12:00 noon on May 5, 1974, Mitchell telephoned an NTF agent and advised him that Brown had just been at Gilmore's residence and had told Mitchell that his 230 kilos were in a camper a few blocks away and that the

driver would bring the marijuana any minute (Tr. 13-14, 33). Shortly thereafter, Mitchell told an agent that a black Ford pickup with a white camper, which agents had observed parked alongside the garage, had just delivered the marijuana (Tr. 14, 103-104). Mitchell stated that he had examined the marijuana and that it was packed in large cardboard boxes in Gilmore's garage.

After discussing the price and quality of the marijuana with Gilmore, in Brown's presence, Mitchell left Gilmore's residence on the pretext of taking a sample to his partners (Tr. 104, 167). Mitchell then met with an agent who instructed him to return to Gilmore's house, determine if the marijuana was still there and, if it were, to give a signal for the agents to enter (Tr. 104-105).

Pursuant to his instructions, Mitchell returned to Gilmore's house and gave the prearranged signal (Tr. 105). An officer knocked on a side door of the garage, and asked that it be opened. When the door was not opened, he knocked again and announced: "This is the police. Would you open the door" (Tr. 175-176). As someone opened the door, the officer saw a second person move swiftly inside and also heard a third individual move. He again announced that he was a police officer and stepped inside. The officer then saw Mitchell, Gilmore, and Brown and ordered them to the rear of the garage. He also observed two kilo-size marijuana bricks on a bench on the opposite side of the garage. The officer told Mitchell, Gilmore and Brown that they were under arrest (Tr. 108, 177-180).

He then saw four large cardboard boxes just inside and to the left of the door through which he had entered and could see marijuana in one partly opened box (Tr. 179-180). The four boxes contained 213 kilograms of marijuana. Four kilo-size bricks were also lying on a mattress on

the garage floor. The marijuana in the garage, a total of 219 kilograms, was immediately seized.[2]

2. Petitioners contend that their warrantless arrests were not supported by probable cause because the reliability of the informant Mitchell was not established.

While Mitchell had never before been used as an informant, the reliability of the information he supplied was established by several factors within the NTF agents' knowledge. The agents knew that Mitchell was residing at Gilmore's residence and therefore had an opportunity to see the marijuana in the garage. *United States* v. *Smith*, 503 F.2d 1037, 1039 (C.A. 9). They also knew that Mitchell had no interest in communicating false information since he was hoping that his cooperation would favorably affect the Connecticut charges against him.

Moreover, since Mitchell freely acknowledged his prior illegal purchase of marijuana from Gilmore, the agents had reliable information that recently Gilmore had trafficked in marijuana; this fact further supported Mitchell's statement that Gilmore had obtained the additional

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[2]Later, Gilmore's residence and garage were searched pursuant to a California probation order which gave consent to searches of Gilmore's residence by law enforcement officials (Tr. 110-112). The government made no use of the contraband seized from Gilmore's residence, but it did make use of 12 additional kilograms of marijuana seized from the garage; this marijuana together with the previously seized 219 kilograms formed the basis for petitioners' convictions.

The court of appeals held that the probation order did not authorize the search for and seizure of these 12 kilos of marijuana because "[t]he search was not effected by or even with the authorization of Gilmore's probation officer for a probation-related objective" (Pet. App. A 2), but that any error was harmless because the bulk of the marijuana was not seized pursuant to the probation order.

In its opinion, the court mistakenly implied that the 12 kilos of marijuana were seized from Gilmore's house (*ibid.*).

quantity of marijuana which was stored in Gilmore's garage. *United States* v. *Harris*, 403 U.S. 573, 583-584. Finally, because of their own observations, the agents also knew the underlying circumstances from which Mitchell concluded that marijuana was present in Gilmore's garage; and they therefore credited Mitchell's statement that he personally had seen the marijuana. *United States* v. *Smith*, *supra*.

The reliability of Mitchell's information was personally verified by the NTF agents when, through their own observations, they confirmed significant details of his story. See *Draper* v. *United States*, 358 U.S. 307. On the evening of May 3, 1974, Mitchell told the agents to expect a marijuana delivery at Gilmore's residence. Shortly thereafter, the agents saw an automobile drive up to Gilmore's garage and a figure motion the car to enter, which it did. An agent who approached the garage heard voices inside, the opening of a car trunk, the unloading of objects and the closing of the trunk.

The next morning, Mitchell reported that 95 kilograms of marijuana had been delivered to Gilmore's residence the night before. On the day of petitioners' arrests, Mitchell advised the agents that his marijuana would be delivered by a camper and later said that the delivery had been made by a black Ford pickup with a white camper; this information was verified when the surveillance agents saw such a truck parked near the garage. As a result of the information provided by Mitchell and its corroboration by the agents' personal observations, the agents had probable cause to arrest petitioners and seize the marijuana from the garage.

3. The failure of the NTF agents to obtain a warrant was excused by exigent circumstances. See *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 7-9 (C.A. 9). The agents

were required to make the entry quickly since the marijuana had been delivered with little advance notice and because petitioners expected Mitchell (who then was in Gilmore's residence) and his partners to "come up with the money" and complete the marijuana purchase (Tr. 18). Any delay would have placed Mitchell in danger and might have enabled petitioners to destroy or flee with the marijuana. Since the agents' entry into the garage was proper, the seizure of the marijuana, which was in plain view, was proper. *Harris* v. *United States*, 390 U.S. 234, 236.

Petitioners contend that the warrantless entry was not justified by exigent circumstances because the emergency was created by the NTF agents.[3] Although courts have said that police officers may not create exigent circumstances by unreasonable and deliberate delay, the NTF agents, as we have shown, acted promptly in entering the garage once they were advised by Mitchell that the marijuana was there. Compare *United States* v. *Curran*, 498 F.2d 30, 34 (C.A. 9), and *United States* v. *Scheffer*, 463 F.2d 567 (C.A. 5), certiorari denied *sub nom. Stecher* v. *United States*, 409 U.S. 984.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[3]This contention differs from those in *United States* v. *Santana and Alejandro*, No. 75-19, certiorari granted October 14, 1975, where the issues are what circumstances justify an officer's warrantless entry of a residence to effect an arrest and whether a warrant is ever required to effect an unforced, daytime entry of a residence to effect an arrest.